IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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| AVA SLAUGHTER, | § | |
| | § | |
| Plaintiff, | § | |
| | § | |
| v. | § | CIVIL ACTION NO. H-05-3455 |
| | § | |
| JONES DAY, | § | |
| | § | |
| Defendant. | § | |
| | § | |

**DEFENDANT JONES DAY'S MOTION FOR SUMMARY JUDGMENT**

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**DEFENDANT JONES DAY'S MOTION FOR SUMMARY JUDGMENT**

Defendant Jones Day ("Jones Day" or "Defendant") respectfully files this, its Motion for Summary Judgment, and respectfully shows the Court the following:

## I. NATURE AND STAGE OF THE PROCEEDING

Plaintiff, Ava Slaughter ("Slaughter," or "Plaintiff"), filed suit against Defendant Jones Day on September 19, 2005,[1] alleging that Jones Day discriminated against her because of her race in violation of the Texas Commission on Human Rights Act ("TCHRA") and 42 U.S.C. § 1981 ("Section 1981"). On July 24, 2006, Plaintiff amended her Complaint to add a second cause of action in which she claims that Jones Day unlawfully retaliated against her for her participation in this lawsuit, thereby violating the TCHRA. The parties have conducted a significant amount of discovery. Jones Day now files its Motion for Summary Judgment before this Court seeking disposition in its favor on each of Plaintiff's claims.

[1] Plaintiff originally filed suit in the 152nd Judicial District Court of Harris County, Texas, docketed as Case No. 2005-57372. Jones Day removed the action to federal court on October 7, 2005.

## II. SUMMARY OF ARGUMENT

Jones Day is entitled to summary judgment because Plaintiff does not have sufficient probative evidence to establish a genuine issue of material fact with regard to either of her claims against Jones Day. On the contrary, the undisputed evidence in this case shows that Jones Day in no way discriminated against Plaintiff and that Jones Day selected another candidate for the position of GIS Manager because she was more qualified for the position than was Plaintiff. Furthermore, Plaintiff's retaliation claim fails as a matter of law because the action of which she complains is insufficient to establish a cause of action for retaliation. Jones Day's warning of Plaintiff that her actions in tape recording an internal conversation without the consent of all parties and in taking copies of Firm documents without authorization or approval constituted violations of Firm policy cannot be considered a materially adverse employment action, and there is no evidence that Jones Day acted with a retaliatory motive in so counseling Plaintiff. Accordingly, as more fully set forth below, summary judgment in favor of Jones Day is proper as a matter of law.

## III. SUMMARY JUDGMENT ISSUES AND STANDARD

At issue in this Motion is whether Jones Day is entitled to summary judgment on Plaintiff's claims of race discrimination and retaliation. Summary judgment is appropriate when, viewing the evidence in the light most favorable to the nonmoving party, the record reflects that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24, 106 S. Ct. 2548, 2252-53 (1986); Fed. R. Civ. P. 56(c). In this case, summary judgment is warranted if Plaintiff fails to establish the existence of an essential element of her case. *Celotex*, 477 U.S. at 322. Unsubstantiated beliefs and opinions are not competent summary judgment evidence. *Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir. 1994), *cert. denied*, 513 U.S. 871 (1994). Moreover, Plaintiff must do more than show "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). Rather, she must produce evidence upon which a jury reasonably could base a verdict in her favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511 (1986).

## IV. STATEMENT OF UNDISPUTED FACTS

Plaintiff began her employment with Jones Day ("Jones Day" or the "Firm") as a Technical Support Specialist on January 1, 2001, when Jones Day combined with the former Houston firm of Bayko Gibson Carnegie Hagan & Schoonmaker ("Bayko Gibson") (Deposition of Ava Slaughter, attached hereto as Exhibit "A," at 32; Deposition of Kevin Richardson, attached hereto as Exhibit "B," at 41; Jones Day Staff Employment Form for Ava Slaughter, attached as Exhibit 1 to Affidavit of Kevin Richardson, attached hereto as Exhibit "I"). Plaintiff's job duties as Technology Support Specialist[2] include assembling and placing computer equipment and printers, maintaining equipment and software inventories and departmental records, and assisting technology users in the proper use of hardware and software (Technology Support Specialist Job Description, Ex. A at Ex. 23). The title of Technical Support Specialist or Technology Support Specialist has appeared on each of Plaintiff's performance appraisals at Jones Day beginning in 2001 (Ex. A at 56).

As Technology Support Specialist, Plaintiff is a member of Jones Day's information technology function, which is currently referred to as Technology Support Services ("TSS") (Affidavit of Hugh Whiting, attached hereto as Exhibit "C," at ¶3). From 2001 until March of 2004, the function was referred to as Global Information Systems ("GIS") (*Id.*). TSS/GIS is comprised of a staff of technology specialists and managers and provides general oversight,

[2] Plaintiff's current title, effective October 1, 2004, is Technology Support Specialist (*See* Affidavit of Hugh Whiting, attached hereto as Exhibit "C," at ¶3). Her job duties are the same in this position as they were as Technical Support Specialist (*Id.*).

technology policy direction, coordination and centralized technology support for the Firm. Each Jones Day office has one or more TSS/GIS employees who provide local technology support in the office, the number depending on the size and special needs of each particular office (*Id.*). When Plaintiff became a Jones Day employee in January of 2001, the office size and scope of operation of the Houston office was such that there was need for only a single TSS/GIS Technology Support Specialist (*Id.* at ¶¶3,4).

In or around September 2003, due to the growing demands of the Houston office, Jones Day decided to create a position of GIS Manager in Houston (Ex. B at 114; Ex. C at ¶4). Houston Office Administrator Kevin Richardson ("Richardson") informed Plaintiff of the new position (Ex. B at 114-115, Ex. 11), and the job opening was advertised in the September 19, 2003 issue of the Weekly Bulletin of Jones Day Houston (Ex. A at 228; September 19, 2003 Weekly Bulletin of Jones Day Houston, *Id.* at Ex. 21). The responsibilities of GIS Manager[3] include, among other things, implementing Firm technology standards at the Office level, overseeing the quality of work and timely completion of projects in the GIS department, and ensuring the department's compliance with Office and Firm policies and legal obligations in conjunction with the Office Administrator (GIS Manager Job Description, Ex. I at Ex. 2). The position demands that the GIS Manager have a "strong service orientation" and the Firm requires that the GIS Manager "perform all job duties with a commitment to providing superior service to clients" (*Id.*).

Three internal candidates applied for the position of GIS Manager, including Plaintiff and Jerri Del Riesgo ("Del Riesgo") (Ex. C at ¶4). Each candidate was interviewed by four Jones Day employees: Richardson, Hugh Whiting ("Whiting"), Partner-in-Charge of the Houston

[3] Consistent with the department's change in name from GIS to TSS on March of 2004, this position is now referred to as TSS Manager.

office, and Houston partners Mark Metts ("Metts") and Scott Cowan ("Cowan") (collectively the "Interviewers") (Ex. A at 228-229; Ex C at ¶4; Affidavit of Mark Metts, attached hereto as Exhibit "D," at ¶4; Affidavit of Scott W. Cowan, attached hereto as Exhibit "E," at ¶4). Plaintiff testified that she has no problems with Whiting, Metts, or Cowan, and that she has never filed a complaint against any of them (Ex. A at 49-52, 229-231).[4]

The four Interviewers were provided with each candidate's resume, 2002 and 2003 performance evaluations, and the job description for the GIS Manager position (Ex. C at ¶5, Ex. 3; Ex. D at ¶5; Ex. E at ¶5). Each Interviewer met separately with each of the candidates (Ex. C at ¶5). The Interviewers then met to discuss rankings of the candidates (*Id.*). Whiting asked each Interviewer to rank the candidates in order and asked Cowan and Metts to give him their rankings before he or Richardson revealed their rankings (*Id.*; Ex. D at ¶9; Ex. E at ¶9). Cowan and Metts both recommended that Jones Day select Del Riesgo for the GIS Manager position (Ex. D at ¶9; Ex. E at ¶9). Each of the four Interviewers ranked Del Riesgo first and Plaintiff last (Ex. C at ¶6; Ex. D at ¶9; Ex. E at ¶9). In addition, both Cowan and Metts stated that they would not recommend Plaintiff for the position based, in part, on their experiences working with her (Ex. C at ¶6).

At the time Del Riesgo applied for the GIS Manager position, she worked as a GIS Support Specialist in Jones Day's Columbus office (Ex. I at Ex. 3, p. 9). In this position, she provided technical and operational support for 180 employees, troubleshot network problems and end-user issues, worked closely with the Firm GIS department on software updates and other projects, and trained and mentored other GIS personnel (*Id.*). Richardson testified that Del

[4] Plaintiff had also never filed a complaint against Richardson until after she was not chosen for the GIS Manager position.

Riesgo demonstrated initiative in the interview process by providing the Interviewers with a list of future goals for the Houston GIS department and Manager (Ex. B at 85).

Richardson testified that the Interviewers recommended that Jones Day select Del Riesgo as Houston GIS Manager for a number of reasons: she had been a Jones Day employee for close to ten years and had institutional knowledge of the Firm as a result;[5] she was a former legal secretary and, consequently, was familiar with end user needs and support requirements; she had worked in a Jones Day office that had experienced growth similar to what the Houston office was expected to encounter;[6] she communicated clearly and concisely; and she demonstrated initiative in the interview process (Ex. B at 84-85, 100). Cowan was impressed by the positive attitude that Del Riesgo displayed in her interview regarding customer service and the fact that she had been commended in prior reviews for her attention to detail, organization, and efficiency (Ex. E at ¶6). Metts believed that Del Riesgo demonstrated initiative in her interview and that her answers to his interview questions indicated a clearer and better vision for the future of technology use at the Firm and its Houston office than Slaughter's answers did (Ex. D at ¶6). Whiting made the judgment that Del Riesgo was better prepared to address the service needs and demands of the Houston office because of her experience in the Jones Day Columbus office (Ex. C at ¶ 6). Whiting believed that, during the interview, Del Riesgo displayed both an awareness of the need to provide high level service and sound judgment about how to prioritize the often competing needs of Jones Day's lawyers and staff (*Id.*).

Richardson testified that Plaintiff had a number of problems with respect to her work performance in the past, and that these problems contributed to Jones Day's decision not to promote her to GIS Manager (Ex. B at 52-53, 65-66).[7] The job description for GIS Manager emphasizes that the job requires, among other things, the ability to set priorities, meet deadlines, and to have strong organizational and time-management skills (Ex. I at Ex. 2). In making the GIS Manager hiring recommendations, the Interviewers placed more emphasis on each candidate's service skills than on her technical abilities (Ex. B at 109-110). Plaintiff's problems in these particular areas had been documented continuously throughout her employment with Jones Day, including in her 2002 and 2003 evaluations, which the Interviewers considered in rating the candidates (Ava Slaughter's 2002 Performance Evaluation, Ex. I at Ex. 3, pp. 31-34; Ava Slaughter's 2003 Performance Evaluation, *Id*. at 25-30). In contrast, Del Riesgo's performance evaluations reflected her strengths in these areas (*See*, *e.g.*, Jerri Del Riesgo's 2003 Performance Evaluation, *Id*. at 19-21).[8] Based on their separate interviews, each Interviewers agreed that Del Riesgo was a better qualified applicant for the GIS Manager position than either Adams or Plaintiff (Ex. C at ¶6). As a result, Whiting made the final decision to hire Del Riesgo for the position of GIS Manager (Ex. C at ¶6).

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[5] Plaintiff has recognized that Bayko Gibson was not as structured as Jones Day (Ex. A at 42).

[6] Prior to the combination, Bayko Gibson was a firm of approximately 20 attorneys and 20 non-lawyer staff members (Ex. A at 23). Jones Day's office increased to 62 total personnel as of January 2003 and 75 as of January 2004 (Ex. C at ¶2).

On October 22, 2003, Richardson assured Plaintiff that the position of GIS Manager was a new position and that her current position of Technology Support Specialist would stay intact (Ex. A at 242). Plaintiff remains in the position of Technology Support Specialist and her hours and base compensation have remained unaffected since Del Riesgo was selected to the position of GIS Manager (Ex. A at 281).

On or around November 1, 2003, Plaintiff contacted Stacey Brown ("Brown"), Houston office Human Resources Coordinator, and David Williams ("Williams"), Firm Human Resources Director and Counsel, to complain that she had been discriminated against when the Firm

[7] Richardson also had personal work experience with Del Riesgo (Ex. B at 102).
[8] Richardson testified that he, as an Interviewer, also considered Del Riesgo's performance evaluations recommending that Jones Day promote her to GIS Manager (Ex. B at 191).

selected Del Riesgo for the position of GIS Manager (Ex. A at 47, 214, 220, 222). Specifically, Plaintiff complained that Jones Day decided to hire a GIS Manager for the Houston office and that Plaintiff was not encouraged to apply for the position (*Id*. at 223; Plaintiff's Internal Complaint of Discrimination, *Id*. at Ex. 17). Plaintiff further complained that she believed that she held the position of GIS Manager at the time, that she was placed in a subordinate position after another individual was selected to become the new GIS manager, and that she felt that race was a factor in the decision to place her in the subordinate position (*Id*.). Williams immediately investigated Plaintiff's complaint, but found no evidence that discrimination motivated the Firm's decision for the position of GIS manager (Ex. C at ¶7).

When Williams and Brown met with Plaintiff via telephone conference to report the findings of the internal investigation, Plaintiff tape-recorded the conversation without Williams's or Brown's knowledge (Ex. A at 251, 253). Recording conversations without the consent of all parties is a violation of Jones Day's policy (Jones Day Tape Recordings Policy, attached to Exhibit I as Exhibit 4). In addition, after filing this lawsuit against Jones Day, Plaintiff accessed and took copies of various Firm documents without authorization or approval (Ex. A at 264-66), also in violation of Firm policy (Jones Day Firm Property Policy, attached to Exhibit I as Exhibit 5). Upon learning of these actions by Plaintiff, Jones Day counseled Plaintiff that her conduct violated Firm policy and advised Plaintiff that any future violation of Firm policy may result in disciplinary action (6/20/06 Counseling Report for Ava Slaughter, attached to Exhibit I as Exhibit 6). Jones Day did not revoke any of Plaintiff's employment privileges as a consequence of her misconduct (Ex. C at ¶8). Whiting has testified that neither Plaintiff's race nor any complaints she made had anything to do with Jones Day's counseling of Plaintiff (*Id*.).

In her Complaint, Plaintiff alleges that she was demoted from and/or not selected for the position of GIS Manager based upon her race, in violation of the TCHRA and Section 1981 (Plaintiff's Amended Complaint at ¶4). She further alleges that Jones Day retaliated against her for her participation in this lawsuit when it counseled her for violating firm policy (*Id*. at ¶ 5). Because Plaintiff is unable to create a material issue of fact with regard to either of her claims, Jones Day is entitled to summary judgment as a matter of law.

## V. ARGUMENTS AND AUTHORITIES

### A. Plaintiff Cannot Succeed On Her Claim Of Discrimination As A Matter Of Law

The TCHRA,[9] like Title VII,[10] prohibits an employer from discriminating against an employee because of her race. TEX. LAB. CODE ANN. § 21.051 (Vernon 1996). An employee presents a *prima facie* case of discrimination in a failure to promote case[11] by demonstrating four elements: (1) that the employee is a member of the protected class; (2) that she sought and was qualified for the position; (3) that she was rejected for the position despite her qualifications; and

[9] The Texas Supreme Court has observed that one of the purposes behind the TCHRA is the "correlation of state law with federal law in the area of employment discrimination." *Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 483, 485 (Tex. 1991). Accordingly, state courts look to federal law when deciding issues under the TCHRA. *Id.* With respect to race discrimination claims, the federal counterpart to the TCHRA is Title VII. Because the TCHRA tracks its federal counterpart, courts consider analogous federal case law in the interpretation and application of the TCHRA. *Wallace v. The Methodist Hosp.*, 271 F.3d 212, 219n.10 (5th Cir. 2001); *Romo v. Tex. Dep't. Transp.*, 48 S.W.3d 265, 269 (Tex. App. — San Antonio 2001, no pet.).

[10] Title VII of the Civil Rights Act of 1964 ("Title VII").

[11] Although Plaintiff claims that she personally believes that she held the position of GIS Manager before Del Riesgo was hired, her claim is tantamount to a failure to promote claim because there is no evidence that Plaintiff's job responsibilities ever changed either before or after Del Riesgo was hired as the GIS Manager. Moreover, even if Plaintiff argues that she was demoted rather than failed to be promoted, Jones Day still succeeds upon its Motion for Summary Judgment for reasons similar to those explained herein.

In order to make out a *prima facie* case of discrimination when the adverse employment action at issue is a demotion, the employee must show (1) that she was demoted, (2) that she was qualified for the position she occupied, (3) that she was in a protected class, and (4) that she was replaced by a person outside her protected class. *Crawford v. Formosa Plastics Corp.*, 234 F.3d 899, 902 (5th Cir. 2000). Because Plaintiff cannot demonstrate that her basic job functions changed, she is unable to establish that she suffered a demotion at any time during her employment with Jones Day. An employment action that "does not affect job duties, compensation, or benefits" is not an adverse employment action under Title VII. *Hunt v. Rapides Healthcare Sys., L.L.C.*, 277 F.3d 757, 769 (5th Cir. 2001). Furthermore, because Plaintiff was not qualified for the position of GIS Manager, she will not be able to make out a *prima facie* case of discrimination based upon any alleged "demotion." Accordingly, for the reasons articulated herein, Jones Day is entitled to summary judgment as a matter of law.

(4) that the employer continued to seek or promoted applicants with the plaintiff's qualifications. *Davis v. Dallas Area Rapid Transit*, 383 F.3d 309, 317 (5th Cir. 2004); *Perez v. Region 20 Educ. Service Center*, 307 F.3d 318, 324 (5th Cir. 2002). If a plaintiff establishes a *prima facie* case of discrimination based upon a failure to promote, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the plaintiff's rejection. *Perez*, 307 F.3d at 324. If the employer articulates a nondiscriminatory reason for its failure to promote the plaintiff, then the burden shifts back to the plaintiff to prove that the employer's articulated reasons are simply a pretext for discrimination. *Id*.

Title VII does not prohibit an employer from refusing to promote an employee, even one who is performing her current position adequately, and filling the position with an individual outside the plaintiff's protected class whom the employer subjectively believes will do a better job. *See Elliott v. Group Med. & Surgical Serv.*, 714 F.2d 556, 567 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984). Accordingly, the fact that Jones Day selected Del Riesgo for the GIS Manager position, standing alone, does not establish pretext. Rather, in order to raise an issue regarding pretext, Plaintiff must establish that she was "*clearly better qualified*" than Del Riesgo. *Price v. Fed. Express Corp.*, 283 F.3d 715, 723 (5th Cir. 2002) (emphasis added); *Nichols v. Lewis Grocer,* 138 F.3d 563, 568 (5th Cir. 1998); *Odom v. Frank,* 3 F.3d 839, 845-46 (5th Cir. 1993); *Roy v. U.S. Dept. of Agriculture*, 2004 U.S. App. LEXIS 24082, *7 - *8 (5th Cir. 2004) (unpublished opinion, attached hereto as Exhibit "F") (holding that the "clearly better qualified" standard is "extremely high – evidence of the plaintiff's qualifications must be 'of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question'") (quoting *Celestine v. Petroleos de Venezuella SA*, 266 F.3d 343, 357 (5th Cir. 1992)).

In other words, it is not enough for Plaintiff to establish that she was *as qualified* as Del Riesgo for the position. *Nichols*, at 568; *EEOC v. La. Office of Cmty. Servs.*, 47 F.3d 1438, 1444 (5th Cir. 1995) (rejecting claim of non-promoted employee where evidence indicated at best that she was *as qualified* as the selected applicants) (emphasis in original); *Odom*, 3 F.3d at 845-46. Rather, to raise an inference of pretext, Plaintiff must establish that no reasonable person exercising impartial judgment could have chosen Del Riesgo over Plaintiff for the position. *Celestine*, 266 F.3d at 357. Plaintiff's self-interested characterizations of job performance and qualifications do not create a genuine issue of material fact to defeat summary judgment. *See Guthrie v. Tifco Indus.*, 941 F.2d 374, 378 (5th Cir.), *cert. denied*, 503 U.S. 980 (1992). Because Plaintiff is unable to make such a showing, her discrimination claim fails as a matter of law.

**1. Plaintiff was not qualified for the position of GIS Manager.**

Plaintiff is unable to establish a *prima facie* case of discrimination because she cannot demonstrate that she was qualified for the position of GIS Manager in September of 2003. Plaintiff bears the burden of establishing that she was objectively qualified for the position she sought. *Oden v. Oktibbeha County*, 246 F.3d 458, 469 (5th Cir. 2001). As articulated in the GIS Manager job description, the position demands excellent communication skills, strong organizational and time management skills, and superior customer service abilities (Ex. I at Ex. 2, pp. 3-4). These areas are the very ones in which Plaintiff had demonstrated substandard performance during her tenure at Jones Day. (*See generally* Ex. I at Ex. 3, pp. 25-34).

For example, in her 2002 Performance Evaluation, Richardson indicated that "[Plaintiff] needs to better organize her time. . . better organization will provide for better time management," and that "[Plaintiff] must consistently follow through with user requests and communicate such follow-up." (*Id.* at 32 (emphasis in original)). Richardson further listed organization and communication as two of the three areas on which Plaintiff should focus in the coming year (*Id.*). Also in her 2002 Performance Evaluation, Houston Senior Associate Jason Leif commented, "[Plaintiff] often appears harried and unorganized. I find that to get a response to an inquiry I need to page her – emails and messages go unreturned. I would have concerns about her ability to handle a larger staff as our office continues to grow and assuming we hire more [GIS] staff." (*Id*. at 33).

Even more telling, Jones Day's former Global GIS Director, Terry Crum, noted in Plaintiff's 2003 Performance Evaluation that "the perception exists at the Firm level that [Plaintiff] is unable to provide the leadership and organization needed to complete the work (for larger initiatives)." (*Id*. at 27). Richardson rated Plaintiff's 2003 performance as needing improvement in her effectiveness of communication and commented that "[Plaintiff] continues to struggle to keep organized and to effectively and timely communicate with me, lawyers and/or staff." (*Id*. at 28-29). As these evaluations attest, Plaintiff did not demonstrate communication, organizational, or customer service skills at an ability level sufficient to effectively perform in her own position, let alone the position of GIS Manager. Accordingly, Plaintiff cannot demonstrate that she was qualified for the GIS Manager position, and she is unable to establish a *prima facie* case of discrimination based upon Jones Day's decision not to promote her to GIS Manager.

**2. Jones Day did not promote Plaintiff for a legitimate, nondiscriminatory reason, and Plaintiff cannot establish pretext.**

Assuming *arguendo* that Plaintiff can establish a *prima facie* of race discrimination, Jones Day is still entitled to summary judgment because the undisputed evidence establishes that Jones Day did not promote Plaintiff to the GIS Manager position because: (1) the Interviewers collectively recommended Del Riesgo for the position; and (2) Whiting believed that Del Riesgo was better qualified for the position than Plaintiff.

Both Plaintiff and Del Riesgo were interviewed by four different Jones Day employees, including Whiting, Houston's Partner-in-Charge, Richardson, Houston's Office Administrator, and Houston partners Cowan and Metts. Each Interviewer also reviewed the candidates' resumes, 2002 and 2003 performance evaluations, and the job description for the GIS Manager position. Following the interviews, all four Interviewers individually recommended that Jones Day promote Del Riesgo to the position of Houston GIS Manager. By contrast, each of the Interviewers ranked Plaintiff last among the candidates. In addition, both Cowan and Metts stated that they would not recommend Plaintiff for the position based, in part, on their experiences working with her. The fact that Plaintiff's colleagues, with whom she had no complaint, expressed negative statements about their past experiences working with Plaintiff and clearly stated that Plaintiff should not be given the position cannot be overemphasized. *See Sreeram v. Louisiana State Univ. Med. Center-Shreveport*, 188 F.3d 314, 319 (5th Cir. 1999).

The Interviewers concluded that Del Riesgo was the best candidate for the GIS Manager position for several reasons, including the following: she had been a Jones Day employee for close to ten years and had institutional knowledge of the Firm as a result; she was a former legal secretary and, consequently, was familiar with user needs and support requirements; she had worked in a Jones Day office that had experienced growth similar to what the Houston office was expected to encounter; she communicated clearly and concisely; and she demonstrated initiative in the interview process. As a result of these considerations and the Interviewers' determinations that Del Riesgo was the best qualified candidate for the position, Whiting selected Del Riesgo to be the new Houston GIS Manager. "The promotion of a better qualified applicant is a legitimate and nondiscriminatory reason for preferring the successful applicant over the rejected employee who claims that the rejection was discriminatory." *Jeffries v. Harris County Cmty. Action Ass'n.*, 693 F.2d 589, 590 (5th Cir. 1982).

Moreover, Plaintiff has no evidence that Jones Day's legitimate, nondiscriminatory reason for its decision not to promote Plaintiff is false or merely a pretext for discrimination. In order to raise an issue regarding pretext in response to Jones Day's Motion for Summary Judgment, Plaintiff must establish that she was "clearly better qualified" than Del Riesgo. *Price*, 283 F.3d at 723. Merely showing that two candidates are *similarly* qualified does not establish pretext in a Title VII case. *Id*. (emphasis added); *see also EEOC v. La. Office of Cmty. Servs.*, 47 F.3d 1438, 1445 (5th Cir. 1995) (rejecting the claim of a non-promoted employee when the evidence indicated at best only that she was *as qualified* as the selected applicants) (emphasis in original).

Under the facts, Plaintiff cannot establish that she was "clearly better qualified" for the GIS Manager position as a matter of law. First, it is undisputed that at the time she applied for the position, Plaintiff's work evaluations demonstrated a history of inferior performance in the areas of communication, organization, and customer service. Moreover, an objective panel of interviewers concluded that Del Riesgo was the best candidate for the position because she demonstrated strengths in these areas, all of which they considered to be of crucial importance to the position of GIS Manager. Indeed, the overwhelming evidence in this case demonstrates that the Interviewers considered Del Riesgo to be the most qualified candidate for GIS Manager because her experience, work evaluations, and interview presentation highlighted her superior ability to set priorities, communicate effectively, coordinate and meet deadlines on important projects, and successfully organize her time and work requirements. Based upon these undisputed facts, Plaintiff cannot point to any evidence to demonstrate that her qualifications were "of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen [Del Riesgo] over [Plaintiff] for the job in question." *Roy*, 2004 U.S. App. LEXIS 24082, at *7 - *8 (quoting *Celestine v. Petroleos de Venezuella SA*, 26 F.3d 343, 357 (5th Cir. 1992)) (Ex. F).

Nor is there any evidence that Jones Day's decision to promote Del Riesgo over Plaintiff was motivated by discrimination. The only "evidence" that Plaintiff may present that her race played a part in Jones Day's decision is her own testimony that Richardson "has problems with blacks and females" (Ex. A at 248). A plaintiff may not rely on her subjective belief to establish pretext for discrimination. *See*, *e.g.*, *Roberson v. Alltel Information Servs.*, 373 F.3d 647, 654 (5th Cir. 2004) (holding that a plaintiff's self-interested characterizations of job performance and qualifications are legally insufficient to prove she was "clearly better qualified"). To be sure, a plaintiff's own belief that discrimination motivated an employer's decision "is of little value." *Nichols,* 138 F.3d at 570; *Guthrie v. Tifco Indus.*, 941 F.2d 374, 378 (5th Cir.), *cert. denied*, 503 U.S. 980 (1992); *Little v. Republic Refining Co., Ltd.*, 924 F.2d 93, 96 (5th Cir. 1991) ("a subjective belief of discrimination, however genuine, [cannot] be the basis of judicial relief"). Moreover, Whiting, not Richardson, made the decision to promote Del Riesgo over Plaintiff to the GIS Manager position (Ex. C at ¶5-6). To be probative, allegedly discriminatory statements or actions must be made by the relevant decision maker. *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 223 (5th Cir. 2001).

Notably lacking in this case is *any* suggestion by Plaintiff that she was subject to racial slurs, epithets, or that Plaintiff witnessed any other action suggesting that race motivated the Interviewers or that race played any part in Whiting's decision to promote Del Riesgo over

Plaintiff. To the contrary, Plaintiff's only "evidence" is rank speculation that she was discriminated against because of her race (*See*, *e.g.*, Plaintiff's Amended Complaint ¶4.10). As noted above, Plaintiff cannot survive summary judgment based solely upon her subjective belief. *See*, *e.g.*, *Little*, 924 F.3d at 96. Moreover, even if Plaintiff were able to present some evidence which raised an inference of discrimination, summary judgment is still appropriate where, as here, there is abundant evidence supporting the defendant's legitimate reason for the decision at issue. *See Auguster v. Vermilion Parish Sch. Bd.*, 249 F.3d 400, 404 (5th Cir. 2001); *Rubinstein v. Adm'rs of Tulane Ed. Fund*, 218 F.3d 392, 400 (5th Cir. 2000), *cert. denied*, 532 U.S. 937 (2001); *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 223 (5th Cir. 2000) (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148, 120 S.Ct. 2097, 2109 (2000)); *Wallace*, 271 F.3d at 223. As such, Plaintiff has no basis upon which to overcome Jones Day's legitimate, nondiscriminatory reason for its decision not to promote Plaintiff, and Plaintiff cannot create a fact issue regarding pretext as a matter of law.

Moreover, even if Plaintiff is able to present some evidence that Jones Day's explanation is pretextual, she must still present evidence sufficient to support an inference that intentional discrimination was the real reason for the employment decision. *Price*, 283 F.3d at 723. The ultimate burden of proof in persuading the trier of fact that the defendant intentionally discriminated lies at all times with the plaintiff. *Vadie v. Mississippi State University*, 218 F.3d 365, 374 n23 (5th Cir. 2000). Thus, if the plaintiff's evidence to rebut the non-discriminatory reasons offered by her employer is not so persuasive so as to support an inference that the real reason was discrimination, the plaintiff has failed to meet her burden. *Rubinstein*, 218 F.3d at 400. Because any evidence to which Plaintiff can point to support her claims is insufficient to demonstrate that Jones Day intentionally discriminated against Plaintiff, this Court should grant Jones Day's Motion for Summary Judgment.

**B. Plaintiff's Retaliation Claim Fails As A Matter Of Law**

Furthermore, because Plaintiff cannot establish all of the elements of her claim of retaliation, Jones Day is entitled to summary judgment on this cause of action. The burden-shifting structure applicable to Title VII discrimination cases is also applicable to retaliation cases. *Perez v. Region 20 Educ. Serv. Ctr.*, 307 F.3d 318, 325 (5th Cir. 2002); *Rios v. Rossotti*, 252 F.3d 375, 380 (5th Cir. 2001); *Eugene v. Rumsfeld*, 168 F. Supp. 2d 655, 680 (S.D. Tex. 2001). In order to establish a *prima facie* case of retaliation, Plaintiff must show "(1) [s]he engaged in a protected activity; (2) [s]he suffered an employment action; and (3) a causal nexus exists between the protected activity and the materially harmful employment action." *Perez*, 307 F.3d at 325; *Burlington v. Northern and Santa Fe Railway Co. v. White*, No. 05-269, 126 S. Ct. 2405 (2006). If Slaughter proves her *prima facie* case, Jones Day must provide a legitimate, nondiscriminatory reason for the adverse employment action. *Coleman v. Exxon Chemical Corp.*, 162 F.Supp. 2d 593, 609 (S.D. Tex. 2001). Once Jones Day provides this legitimate, nondiscriminatory reason, Slaughter has the ultimate burden to demonstrate that "the adverse employment action would not have occurred 'but for' her participation in the protected activity." *Eugene*, 168 F. Supp. 2d at 681; *Rios*, 252 F.3d at 380; *Ackel v. National Communs., Inc.*, 339 F.3d 376, 385 (5th Cir. 2003).

Plaintiff claims that Jones Day's June 20, 2006 Counseling Report was issued in direct retaliation for her actions in filing a complaint against the Firm (Plaintiff's Amended Complaint ¶5.10-5.12). Plaintiff further alleges that this Counseling Report "threatened [Plaintiff] with termination and acts as a chill upon her motivation to act to protect her rights," (*Id.* at ¶3.34) and that the counseling would not have occurred but for her filing a charge of discrimination against Jones Day (*Id.* at ¶5.14). Because Plaintiff cannot present evidence sufficient to establish every element of her claim of retaliation, Jones Day is entitled to summary judgment as a matter of law.

### 1. Plaintiff cannot establish a *prima facie* case of retaliation.

Plaintiff cannot establish a *prima facie* case of retaliation because, for the reasons explained below, she cannot prove that she suffered an adverse employment action. Furthermore, Plaintiff's retaliation claim fails because there is no evidence to support a causal connection between any alleged protected activity and any adverse employment action.[12]

Traditionally, the Fifth Circuit has analyzed the requirement of an adverse employment action in a stricter sense than some other circuits. *See Ackel*, 339 F.3d at 385; *Hernandez v. Crawford Bldg. Material Co.*, 321 F.3d 528, 531 (5th Cir. 2003); *Burger v. Central Apt. Mgmt., Inc.*, 168 F.3d 875, 878 (5th Cir. 1999). Under the Fifth Circuit's pre-*Burlington Northern* jurisprudence, only an "ultimate employment decision" could form the basis of liability for a retaliation claim under Title VII. *Id.* Ultimate employment decisions include "'hiring, granting leave, discharging, promoting, and compensating.'" *Hernandez*, 321 F.3d at 531 (quoting *Dollis v. Rubin*, 77 F.3d at 777, 781-82 (5th Cir. 1997)).

The United States Supreme Court's decision in *Burlington Northern and Santa Fe Railway Company v. White* altered the standard for retaliation claims with respect to the adverse employment action element of Plaintiff's *prima facie* case. 126 S. Ct. 2405 (2006). Specifically,

[12] Furthermore, to the extent that Plaintiff argues that her tape-recording her conversation with Williams and/or taking Firm documents off-premises without authority or approval to do so constitutes "protected activity" under the TCHRA, Jones Day disputes that Plaintiff is able to satisfy this element of her *prima facie* case. Jones Day does not contest that Plaintiff engaged in protected activity by filing a charge of discrimination or in bringing this lawsuit. It does, however, protest any allegation by Plaintiff that her violations of Firm policy were justified by her participation in this case and that they, therefore, are legally protected.

the Court held that in order to state a cause of action for retaliation, Plaintiff must plead facts sufficient to demonstrate that, if true, the retaliation in question has produced an injury or harm that a reasonable employee would have found to be materially adverse. *Id.* However, in so holding, the Court emphasized that the antidiscrimination provision of Title VII "does not protect an individual from all retaliation," and that "trivial harms," "petty slights" and/or "minor annoyances that often take place at work and that all employees experience" are not sufficient to state a claim for retaliation under Title VII. *Id.*; *see also Harris v. Fresenius Med. Care*, 2006 U.S. Dist. LEXIS 50454, No. H-04-4807, at *52 (S.D. Tex. 2006)[13] (holding that scheduling later lunch breaks, not disciplining employees who talked a language other than English among themselves, and assigning certain patients to certain employees are not "materially harmful employment actions" under *Burlington Northern*); *Molina v. Equistar Chems., L.P.*, 2006 U.S. Dist. LEXIS 47075, No. C-05-327 (S.D. Tex. June 30, 2006)[14] (holding that a plaintiff who resigned after his employer requested that plaintiff meet with his supervisors and provided plaintiff with a "Last Chance Agreement" did not suffer an adverse employment action under *Burlington Northern*).

Thus, even under *Burlington Northern*'s newly-articulated standard for retaliation cases, Plaintiff cannot demonstrate that she was subjected to an adverse employment action when she was counseled on June 20, 2006. The counseling report at issue did not revoke any of Plaintiff's employment privileges at Jones Day, nor did it alter her employment status at the Firm in any way. Plaintiff was counseled that her actions constituted violations of Firm policy and was advised that any future policy violations could result in disciplinary action (Ex. I at Ex. 6). This allegedly retaliatory action did not produce an "injury or harm" that may be reasonably perceived to be "materially adverse" to Plaintiff. Rather, at most, this action constituted a mere "trivial harm," if it may even be considered harmful at all. Accordingly, Plaintiff cannot meet her burden to establish that her counseling constituted an adverse employment action.

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[13] Attached hereto as Exhibit "G."
[14] Attached hereto as Exhibit "H."

Moreover, Plaintiff is unable establish a *prima facie* case of retaliation because she cannot show that a causal connection exists between her filing a complaint of discrimination against Jones Day and any allegedly adverse employment action. A plaintiff is only able to establish a causal link when she can demonstrate that without some explanation from the defendant, it is more likely than not that the actions in question were based upon retaliatory criterion. *See De Anda v. St. Joseph Hosp*. 671 F.2d 850, 857 (5th Cir. 1982) (quoting *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 576, 98 S. Ct. 2943, 2949 (1978)).[15] In this case, Plaintiff admits to tape-recording a conversation without the consent of all parties involved (Ex. A at 251, 253). In addition, Plaintiff testified that she took documents from Jones Day's GIS department to give to her attorney without obtaining approval to do so (*Id.* at 266). These actions are direct violations of Jones Day policy under the plain language of the applicable policies (*See* Ex. I at Exs. 4,5). For this reason, Plaintiff cannot demonstrate that it is more likely than not that Jones Day's actions in counseling her were in retaliation for her filing a complaint of discrimination, and Plaintiff cannot establish a *prima facie* case of retaliation.

**2. Jones Day disciplined Plaintiff for a legitimate, nondiscriminatory reason, and Plaintiff cannot establish pretext.**

Furthermore, even if Plaintiff is able to establish a *prima facie* case of retaliation, Jones Day is entitled to summary judgment because it had a legitimate, nondiscriminatory reason for its action, and Plaintiff has no competent summary judgment evidence of pretext. As the

[15] Furthermore, "'the mere fact that some adverse action is taken *after* an employee engages in some protected activity will not *always* be enough for a *prima facie* case.'" *Roberson*, 373 F.3d at 655 (quoting *Swanson v. Gen. Servs. Admin.*, 110 F.3d 1180, 1188 n.3 (5th Cir. 1997) (emphasis in original)).

undisputed facts demonstrate, Jones Day counseled Plaintiff because her actions in tape-recording a conversation with Williams and Brown without their knowledge and taking Firm documents without authorization or approval are in direct violation of Firm Policy (*See* Ex. I at Exs. 4,5).

Plaintiff has no evidence, let alone evidence to create a genuine issue of material fact, that Jones Day's reason for counseling her included her filing a charge of discrimination. Instead, Plaintiff simply makes a generalized, conclusory argument that she would not have been disciplined but for her participation in filing the charge of discrimination (Plaintiff's Amended Complaint at ¶5.14). Conclusory allegations, unsubstantiated assertions, and subjective beliefs are not competent evidence in support of a claim of retaliation. *Scrivner v. Socorro Ind. Sch. Dist.*, 169 F.3d 969, 972 (5th Cir. 1999).[16] Plaintiff offers no competent summary judgment evidence that creates an issue of fact as to whether retaliatory animus was a motivating factor in her counseling. Accordingly, Plaintiff's claim of retaliation fails, and Jones Day is entitled to summary judgment as a matter of law.

## **VI. CONCLUSION**

For the above-stated reasons, Jones Day prays that the Court grant Defendant's Motion for Summary Judgment on all of Plaintiff's claims against Jones Day. Jones Day further requests all other and further relief, at law or in equity, to which it may show itself to be justly entitled.

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[16] Furthermore, Plaintiff's mere disagreement with Jones Day's decision to discipline her is not sufficient to show pretext. *See Perez*, 307 F.3d at 325.

Respectfully submitted,

/s/ Shauna Johnson Clark by permission Kelley Edwards

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**CERTIFICATE OF SERVICE**

This pleading was served in compliance in compliance with Rule 5 of the Federal Rules of Civil Procedure by electronic transmission on this 10th day of November, 2006, to counsel listed below:

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